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No. 98-1433

In the

Supreme Court of the United States

CHILDREN OF THE ROSARY, KATHERINE A. SABELKO, AND ARIZONA CIVIL LIBERTIES UNION,
Petitioners,

vs.

THE CITY OF PHOENIX, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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888

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Argument 1

I. Respondents Candidly Admit That the Challenged Regulation Had the Purpose and the Effect of Accomplishing Viewpoint Discrimination 1

II. The Courts of Appeals Are In Conflict on the Questions Presented 4

Conclusion 5

TABLE OF AUTHORITIES

Page(s)

Cases

AIDS Action Committee v. Massachusetts Bay Transportation Authority, 42 F.3d 1 (1st Cir. 1994) . . . 5

Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1988) 2

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 2

Lebron v. Washington Metropolitan Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) 5

Lehman v. City of Shaker Heights, 418 U.S. 893 (1974) . 2-3

New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123 (2d Cir.), *cert. denied*, 119 S. Ct. 68 (1998) 4-5

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 1, 2

U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 4

United Food and Commercial Workers Union v. SORTA, 163 F.3d 341 (6th Cir. 1998) 5

Wirta v. Alameda-Contra Costa Transit District, 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (1967) 4

ARGUMENT

I. RESPONDENTS CANDIDLY ADMIT THAT THE CHALLENGED REGULATION HAD THE PURPOSE AND THE EFFECT OF ACCOMPLISHING VIEWPOINT DISCRIMINATION.

In their Brief in Opposition, respondents do not deny that their exclusion of political and religious speech from the forum they created was purposeful. *Cf.* App. at 30a ("In its Answer, the City of Phoenix admitted the facial ban on non-commercial speech is aimed at excluding 'political' and 'religious' speech from advertising on City owned buses"). Instead, respondents contend that the purposeful exclusion of such does not present an important federal question. *See* Opp. at 11-12 (e.g., "Petitioners also renew their somewhat puzzling contention . . . that the City's policy is invalid because the City's 'admitted purpose [was] to exclude political and religious expression'").

In addition to their conceded *purpose* of excluding political and religious viewpoints by permitting only commercial solicitations, respondents also concede that their regulation would inevitably achieve its intended *effect*. Opp. at 12 ("Such viewpoint-differential *effects* are the inevitable consequence of many forms of regulation").

Effective, targeted exclusions of all political and religious perspectives and expression from a forum created by the government are unconstitutional. This is not a "puzzling contention," as respondents assert, but the clear teaching of this Court's cases. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) ("These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation" . . . "Once it has opened a limited forum, however, the State . . . may not . . . discriminate against speech on the basis of its viewpoint")

(citations omitted); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'") (citation omitted).

Indeed, in *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1988), this Court held that even when viewpoint discrimination lurks behind a neutral "pretext," it is unconstitutional. 473 U.S. at 812. *A fortiori*, where the government *admits* that its goal is the elimination of disfavored viewpoints, the challenged restriction fails constitutional muster. Even if only content, rather than viewpoint discrimination is involved, an exclusion from a forum must be shown to be "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829. The record in this case contains nothing supporting the reasonableness of excluding *all* speech that is not a commercial solicitation from the transit display spaces. Respondents do not suggest that it does. Instead, respondents rely on the incorrect (and untenable) proposition that a city seeking to raise revenue through leasing city property or advertising space may, as a matter of right, exclude all noncommercial messages from that space if it so chooses.

In asserting this remarkable proposition, respondents rely entirely on this Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Opp. at 7-10. *Lehman* involved a ban, not on all non-commercial solicitation, as here, but on "short term candidacy or issue-oriented advertisement," 418 U.S. at 304, i.e., all political campaign advertising. In upholding this specific, limited exclusion, the plurality found persuasive the City of Shaker Heights concerns about the possibly injurious impact of short-term, partisan, political advertisements. 418 U.S. at 304. Such advertisements raise "sticky administrative problems . . . in parceling out limited

space to eager politicians" with the consequence that "[t]here could be lurking doubts about favoritism." *Id.* The City also feared that including short-term, partisan, political advertisements would jeopardize long-term commercial contracts. *Id.*

Phoenix's complete ban on *all* non-commercial expression is not in the least supported by the much more limited exclusion of partisan, political campaign advertisements involved in that case. It is simply absurd to suggest, as respondents do, that the City's refusal to display a quotation from the Bible, accompanied by the slogan, "Choose Life," or a statement that "The ACLU Supports Free Speech for Everyone" is justified by feared losses of "long-term commercial advertising," or by feared "lurking doubts of favoritism," or by the specter of "sticky administrative problems" related to "parceling out limited space to eager politicians."

From the quite limited accommodation described by the plurality in *Lehman*, the City of Phoenix seeks to craft the legal justification for a broad, viewpoint-based restriction on speech. The city's efforts to justify or even to explain its restriction, however, fall far short of the justifications accepted in that case by the *Lehman* panel. App. at 27a (Judge Noonan, dissenting) ("the avoidance of violence against the buses seems to border on the absurd; the other two rationales . . . would both be served by the kind of precision suggested here").

Respondents invocation of *Lehman* as support for such a broad, purposeless exclusion of all non-commercial expression from an established forum emphasizes the need for this Court's review in order to clarify the applicable constitutional principles in this important area.

II. THE COURTS OF APPEALS ARE IN CONFLICT ON THE QUESTIONS PRESENTED[1]

Respondents' contention that the decision below is not in conflict with decisions of other courts of appeals rests on a misreading of those cases.

Respondents deny that the decision below conflicts with *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983). To be sure, the court of appeals proceeded on the view that the transit display spaces were public fora. 708 F.2d at 764-67. Respondents' argument to that point, however, is merely a distraction from the actual conflict over the appropriate level of scrutiny to be applied to exclusions of messages because of their political or religious perspectives or content. Pet. at 17.

Respondents also contend that the decision below is not in conflict with *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir.), *cert. denied*, 119 S. Ct. 68 (1998). Opp. at 14. In *New York Magazine*, however, the court of appeals stated, "where there are both commercial and political elements present in speech, even the determination whether the speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as the MTA." 136 F.3d at 125. The judgment below invests the City of Phoenix below with unbridled discretion to make such determinations.[2]

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1. Respondents leave unanswered *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (1967) (here). *Compare* Pet. at 16-17 n.11 *with* Opp. at 13-16.

2. *New York Magazine* contradicts respondents in other essential points: "it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a nonpublic forum, such that we would examine the exclusion only for reasonableness." 136 F.3d at 129-30. Respondents, however, substitute

Respondents deny that there is a conflict with *Lebron v. Washington Metropolitan Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984). To justify that conclusion, Respondents ignore the very point on which *Lebron* and the judgment below conflict: the constitutionality of delegating unbridled discretion to transit display managers to deny access to transit display spaces. *Compare* Opp. at 14-15 with Pet. at 23.

Finally, respondents argue that, unlike, *AIDS Action Committee v. Massachusetts Bay Transportation Authority*, 42 F.3d 1 (1st Cir. 1994), there is no viewpoint discrimination here, and that petitioners have not, in any event, raised such a claim in the questions presented.[3] Opp. at 16. But an admitted animus against religious and political speech is viewpoint discrimination, as is exclusion of commercial advertisements just because they were presented from *religious* or *political* perspectives.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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their conclusory determination (that the spaces were not a public forum because political and religious speech had been excluded from them) for a reasoned consideration of the public forum status of the exterior display spaces. Respondents disregard *New York Magazine*'s explanation that the value of identifying excluded categories of speech in these cases does *not* lie in the premise that "the exclusion of categories of speech creates a non-public forum . . . ." 136 F.3d at 130.

3. Respondents are mistaken. The problem of viewpoint discrimination in this case is plainly within, or at least fairly included within, the first and second questions presented in the petition. Pet. at *i*.

4. "[T]he government nevertheless violates the First Amendment when its stated purpose in reality conceals a bias against the viewpoint advanced by the excluded speakers." *United Food and Commercial Workers Union v. SORTA*, 163 F.3d 341, 356 (6th Cir. 1998).

Respectfully submitted,

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